Testimony before the State-Tribal Relations Committee of the Montana Legislature
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By Alan Mikkelsen

Chairman Trahan, members of the Council, Chairman Windy Boy, members of the Committee, my name is Alan Mikkelsen. I want to thank the Committee for their invitation to speak today. That invitation included a request from the Committee to answer two questions. Where do I think the Compact process is today and what do I think the future holds?

I will answer those questions succinctly, but I first want to set the stage for those answers. I have provided the Committee with some background information, but I will expand on that here. You will hear a lot of language about water rights and property rights associated with those water rights. Let me try to clarify this situation. You are now sitting, not only on the Flathead Indian Reservation, but you are also sitting within the largest Federal irrigation project in Montana. This is the 130,000 acre Flathead Indian Irrigation Project, owned by the United States.

There are three state chartered irrigation districts on this irrigation project. Those irrigation districts were formed in the mid-late 1920's, at the insistence of Congress, for one primary purpose—to ensure the repayment of the construction charges of the Flathead Indian Irrigation Project to the United States. That repayment struggled through the 1930's, with amendatory repayment contracts entered into between the U.S. and the irrigation districts. Irrigators were not actually able to repay construction charges through any of those contracts. So, by the late 1940's, Congress passed an act requiring that all power users, on what was by then, the Flathead Indian Irrigation and Power Project, repay the construction charges. While the irrigation districts were still nominally responsible for repayment of construction charges, the federal government never assessed any charges against the irrigation districts. Instead, the U.S. simply kept retail electrical rates high enough for all power users, to repay the construction debt for both the irrigation and power projects.

The irrigation districts here have never owned or operated an irrigation headgate, canal or a piece of machinery to maintain those facilities. After their so-called repayment responsibilities, they had the additional duty of assessing the Operation and Maintenance fees against private property. They then in turn transmitted these fees to the United States. They never owned, controlled or delivered a single drop of water. In brief, irrigators on the Flathead Indian Irrigation Project have always had a right to use a proportional share of the available water, conditioned upon payment of their Operation and Maintenance assessment. If they don't pay their O&M fees, they do not receive any water. That scenario does not have the requisite characteristics of a water right. It is instead, a right to use water, depending on its availability and payment of a fee. This is exactly the same protection afforded by the proposed Flathead Reservation Compact. Nobody is losing any non-existent water right, or the right to use water. In fact, the associated water use agreement negotiated parallel to the Flathead Compact specifically secures the right to use water for irrigators.

So where are we today? We are in the middle of a mediocre movie called "Back to the Future". All we are missing is a flux capacitor and a DeLorean automobile. We are in the middle of litigation, first filed by the Flathead Irrigation District, and I assume, soon to be joined by the Mission Irrigation District. Because that litigation sought the ownership of the water right for the Flathead Indian Irrigation Project without naming the Confederated Salish and Kootenai Tribes and the United States as parties, the CSKT were forced to respond recently with their own case in federal court, asking that court to determine the nature of the Tribal right as it pertains to the Flathead Indian Irrigation Project.

Why do I call this movie "Back to the Future"? Because what we are now doing is reliving the 1980's and 1990's. The irrigation districts, under the Flathead Joint Board of Control, litigated instream flows, Project operations, water rights, control of the power division of the irrigation project, the Tribal rights for environmental regulation, and other issues. In every single case involving water, environmental regulation, or administrative decisions by the U.S., irrigators lost. I know. I was there for every step of that process. And without the Compact, irrigators and all residents of this area will lose again. They are losing more than $100 million dollars in state and federal contributions to rebuild a dilapidated irrigation project. They are losing a secure right to use water. They will lose quantities of water when instream flows are adjusted upward without any corresponding improvement in the irrigation project to save water. They are losing a low cost block of power associated with Kerr Dam. They are losing the opportunity to have their wells protected by the Compact, as well as the right to drill future wells.

What are they gaining? The only thing I believe they are gaining is the responsibility to pay legal fees to their attorneys for years, perhaps decades. This entire process has been dubbed an "Attorney Stimulus Package". But I don't believe the staff attorneys for the CSKT or the United States are seeing much of a stimulus in their paychecks. Instead, this is providing stimulus only to irrigation district attorneys, in a giant, Costco sized bottle of Viagra. One definition of insanity is doing the same thing over and over again, expecting different results. Our situation here reflects that definition.

Before closing, I want to address what this means to you, as state legislators. Failure of the Flathead Compact means that the Confederated Salish and Kootenai Tribes will file their water claims in court. Those claims will include waters off the reservation, because of their status as Stevens Treaty tribes. Stevens treaty tribes have pervasive off reservation hunting and fishing rights that have been upheld by the courts over the years. That includes rights to instream flows. In the Compact, the CSKT become in essence co-licensees with Montana Fish Wildlife and Parks, on already existing instream flow rights, with priority dates ranging from 1900-1950. Virtually no new water rights are being created, and any existing rights would see little or no impact from these already existing water rights if the Flathead Compact is approved.

Contrast that with what will be before the Water Court. The CSKT filings will include off-reservation claims for all of western Montana, as well as a large portion of eastern Montana. And these instream flow claims will carry a priority date of time immemorial. Please ask yourselves, "Is this something I want to risk, as a representative of the State of Montana?" "Given the alternatives and protections offered by the Flathead Compact, do I want to risk my

constituents water rights on this litigation, when I know those water rights will not be impacted by the Flathead Compact?"

So, in conclusion, where are we? We are back to the future, in the 80's and 90's, reliving and reviving litigation that was lost at that time. We're still looking for our flux capacitor and DeLorean, if you know where to find them. Where are we going? Unless the legislature intervenes and approves the Flathead Reservation Compact, we are simply giving some attorneys an 'attorney stimulus package, much like that giant bottle of Viagra from Costco. Please exercise your leadership, stop the insanity and approve the Flathead Reservation Compact.

Thank you for your invitation to appear here today and thank you for your time. I am willing to answer any questions you may have.